# INSPECTOR GENERAL

*Department of Defense*

# The Navy's Management of Software Licenses Needs Improvement

INTEGRITY ★ EFFICIENCY ★ ACCOUNTABILITY ★ EXCELLENCE

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# Results in Brief

## The Navy's Management of Software Licenses Needs Improvement

August 7, 2013

## Objective

Our objective was to determine whether the Department of the Navy (DON) effectively managed software licenses. Specifically, we determined whether the DON included appropriate clauses in software license contracts. We reviewed 1 Enterprise Licensing Agreement (ELA), 13 non-ELAs, and the associated End User License Agreements (EULAs) to determine if the contracts included desirable language in accordance with the DoD Enterprise Software Initiative approved software licensing training.

## Findings

Overall, the DON made progress toward the mandated use of DON ELAs by issuing a $700 million ELA for Microsoft software. However, the ELA included unacceptable language in 2 of the 11 best practice areas we identified in software licensing training.

In addition, the DON non-ELA software license contracts reviewed, valued at $8.1 million, included unacceptable language for contract clauses in 7 of the 11 areas of concern listed in the software licensing training. Furthermore, 8 of the 13 DON contracting officers accepted EULAs containing unacceptable language.

This occurred because no established requirements existed to guide contracting personnel in making a determination on whether to include specific clause language in software license contracts. Furthermore, 11 of the 13 contracting officers did not receive the

*Findings Continued*

necessary training to gain the specialized knowledge needed to write software license contracts or review EULAs properly. As a result, the DON increased the risk of wasteful spending, disruption to Government operations, and vulnerability to lawsuits, claims, and penalties.

## Recommendations

We recommend that the Assistant Secretary of the Navy (Research, Development, and Acquisition) (ASN[RDA]) require all DON contracting personnel involved in preparing and issuing software license contracts to take specialized training on using appropriate language in software acquisition contracts.

We recommend that the DON Chief Information Officer (CIO):

- require personnel to include favorable language expressed in warranty and embedded third-party software sections of the software licensing training when preparing ELAs for the remaining software on DONs proposed list; and

- issue a memo identifying the types of training available for determining the appropriate language needed to include and avoid in software license contracts.

## Management Comments and Our Responses

The Executive Director for the Deputy Assistant Secretary of the Navy for Acquisition and Policy, responding for ASN(RDA), comments were responsive for both recommendations. The DON CIO comments were responsive to two of three and partially responsive to one of three of the recommendations. We request that the DON CIO provide revised comments to the final by September 9, 2013. Please see the Recommendations Table on the back of this page.

## *Recommendations Table*

| Management | Recommendations Requiring Comment | No Additional Comments Required |
|---|---|---|
| Assistant Secretary of the Navy (Research, Development, and Acquisition) | | 1.a, 1.b |
| Department of the Navy Chief Information Officer | 2.c | 2.a, 2.b |

*Please provide comments by September 9, 2013.

August 7, 2013

MEMORANDUM FOR DEPARTMENT OF THE NAVY ASSISTANT SECRETARY
OF THE NAVY (RESEARCH, DEVELOPMENT, AND
ACQUISITION)
DEPARTMENT OF THE NAVY CHIEF INFORMATION
OFFICER

SUBJECT:  The Navy's Management of Software Licenses Needs Improvement
(Report No. DODIG-2013-115)

We are providing this report for your review and comment.  The Department of the Navy made progress in its management of software licensing by issuing an Enterprise Licensing Agreement for Microsoft, which included best practice language for the acquisition of software licenses.  However, the 13 non-Enterprise Licensing Agreement software contracts we reviewed did not include desired best practice language.  As a result, the Department of the Navy increased the potential of wasteful spending, disruption of Government operations, and vulnerability to lawsuits, claims, and penalties.

We considered management comments on a draft of this report when preparing the final report.  DoD Directive 7650.3 requires that recommendations be resolved promptly. The Executive Director, Deputy Assistant Secretary of the Navy for Acquisition and Procurement comments for Recommendations 1.a and 1.b, responding for Assistant Secretary of the Navy (Research, Development and Acquisition) were responsive and no further comments are needed.  The Department of the Navy Chief Information Officer also provided comments that were responsive on Recommendations 2.a and 2.b; however, comments on Recommendation 2.c were only partially responsive.  Therefore, we request additional comments on this recommendation by September 9, 2013.

If possible, send a portable document format (.pdf) file containing your comments to audros@dodig.mil.  Copies of your comments must have the actual signature of the authorizing official for your organization.  We are unable to accept the /Signed/ symbol in place of the actual signature.  If you arrange to send classified comments electronically, you must send them over the SECRET Internet Protocol Router Network (SIPRNET).

We appreciate the courtesies extended to the staff.  Please direct questions to me at (703) 604-8907 (DSN 664-8907).  If you desire, we will provide a formal briefing on the results.

Alice F. Carey
Assistant Inspector General
Readiness, Operations, and Support

# Contents

# Introduction

## Objective

The overall objective of the audit was to determine whether the Navy was effectively managing software licenses. Specifically, we determined whether the Navy included appropriate clauses in software procurement contracts. We initially planned to review clauses along with how the Navy managed its inventory of software licenses. However, to provide more timely and relevant results to the Department of the Navy (DON), we narrowed the focus to only appropriate clauses in software license contracts.

## Background

During the past 8 years, vendors have made claims against military Services because DoD did not include appropriate language in software contracts or because DoD accepted inappropriate terms in the vendor-prepared End User License Agreements (EULAs[1]). According to the Chief Knowledge Officer within the U.S. Army Acquisition Support Center, when software contracts are not written carefully, the contract and EULA may also violate the Federal Acquisition Regulation (FAR). The following are examples of problems encountered by DoD because of the lack of adequate clauses written in the contract or inappropriate terms accepted in a EULA.

- In an instance involving Navy lease-to-own licenses for Oracle applications, DLT Solutions, an Oracle reseller, sued the Army[2] because the initial contract included a non-substitution clause: "The Government agrees not to replace the equipment and/or software leased under this order with functionally similar equipment and/or software." The claim, including appeals, lasted from 2004 until 2010, and resulted in a settlement with the Government paying DLT Solutions $1.2 million. The DoD could have avoided the lawsuit had it been aware of the clause in the contract that created this risk.

- According to U.S. Army Acquisition Support Center personnel, the Army had to renegotiate a contract to avoid spending more than $40 million to repurchase 80,000 user licenses at a cost of $500 per license. The licenses were for troops deploying from home stations that already had licenses. However, the Army did not initially include a "Times of Conflict" clause that would have prevented the Army from having to purchase new licenses for the deployed troops.

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[1] A EULA is the comprehensive license agreement between the Government and a publisher or reseller that lists the end user's rights. Additional names for a EULA include but are not limited to Purchaser Use Rights, Software License Agreement, or Software User Rights Agreement.

[2] The Army issued the contract for $6.9 million on behalf of the Navy.

- In 2011, a vendor contract contained language in the EULA that violated FAR 52-212-4, "Contract Terms and Conditions–Commercial Items." Specifically, the EULA stated, "Customer rights under the agreement will terminate immediately without notice from vendor if Customer fails to comply with any provisions of the Agreement."  This violates FAR 52-212-4, which requires a contractor to continue performance in the event of a dispute between the contractor and the Government.

Software acquisition contracts that do not include appropriate language can also increase the risk of compromising sensitive DoD information.  For example, when contracts do not include language that limits who can perform an audit of software the Government acquires, the contractor could have an audit performed by a third-party auditor who could access unauthorized sensitive Government information.

The above examples underscore the need for contracting officers to include appropriate clause language in software acquisition contracts and to accept only EULAs that contain the appropriate language that will protect the Government's best interest.

## DoD Software License Policy

The Defense Federal Acquisition Regulation Supplement (DFARS) 227.7202, "Commercial computer software and commercial computer software documentation," states that commercial computer software shall be acquired under the licenses customarily provided to the public unless the licenses are inconsistent with Federal law or don't satisfy user needs.

DFARS 208.7402, "General," also applies to all commercial software.  The DFARS states that departments and agencies shall fulfill requirements for commercial software and related services, such as software maintenance, in accordance with the DoD Enterprise Software Initiative (ESI).  This initiative includes the DoD ESI Software Buyers Checklist, which provides a standardized set of steps to follow when using the ESI's enterprise software agreements.  The Software Buyers Checklist states that DoD information technology buyers reduce buying cycle time and risk by using ESI enterprise software agreements with enhanced terms and conditions that support many DoD objectives and industry best practices.

The DoD ESI is an official DoD initiative sponsored by the DoD Chief Information Officer (CIO) to save time and money on commercial software, Information Technology (IT) hardware, and services.  The DoD ESI's mission is to lead in the establishment and management of enterprise commercial off-the-shelf IT agreements, assets, and policies

for the purpose of lowering total cost of ownership across the DoD, Coast Guard, and intelligence communities. The mission extends across the entire commercial IT life cycle, leveraging the DoD's combined buying power with commercial software publishers, hardware vendors, and service providers.

The Computer Hardware Enterprise Software and Solutions (CHESS) is the Army's designated "primary source" for commercial IT. CHESS provides a no-fee, flexible procurement strategy through which an Army user may procure commercial off-the-shelf IT hardware, software, and services via an e-commerce (IT e-mart). According to the Project Director of Enterprise Solutions Division, CHESS is also the Army's representative to the DoD ESI.

In 2009, the Army CHESS staff created a set of charts and briefings specifically dedicated to software issues shared with other DoD agencies and presented at several events as a portion of an overall CHESS briefing. The software licensing training developed into a stand-alone training in 2010. The DoD ESI also began working with a support contractor to keep the charts updated and provide more examples. Currently, the CHESS software licensing training, titled "Software that Goes Bump in the Night Brief," includes best practices for software licenses acquisition contracts. The same training is also provided through ESI, "Software Licensing Training: Acquiring Licenses in These Changing Times."

The training presents the top 12 areas of concern with the most common issues identified in EULAs and contracts. Specifically, it gives the suggested DoD Software Buyer Checklist requirements for 11 (excludes maintenance) of the areas and includes examples of acceptable and unacceptable language to look for in contracts and EULAs for each area. The 11 specific areas are:

- warranty,

- transfer rights,

- third-party software,[3]

- audit rights,

- click wrap licenses,[4]

- automatic renewals,

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[3] Software associated with a product that DoD purchases but is owned by a vendor other than the vendor DoD purchased the product from.

[4] A statement or notice provided to software user from the vendor that states that by clicking accept, the user agrees to all terms of the vendor's license agreement.

- termination rights,

- governing law,

- order of precedence,

- installation restrictions, and

- virtualization.[5]

In February 2012, DON issued a memorandum, "Mandatory Use of Department of the Navy Enterprise Licensing Agreements," which requires all DON organizations to make software licenses purchases using DON Enterprise Licensing Agreement (ELA)[6] contracts when available. The memorandum also states that all DON organizations and programs can achieve maximum cost savings by using enterprise vehicles as the means of procuring software products.

## Review of Internal Controls

DoD Instruction 5010.40, "Managers' Internal Control Program (MICP) Procedures," July 29, 2010, requires DoD organizations to implement a comprehensive system of internal controls that provide reasonable assurance that programs are operating as intended and to evaluate the effectiveness of the controls. We identified an internal control weakness in the DON software license contracting process. Specifically, DON did not have requirements in place for contracting personnel to make a determination on whether to include specific clause language in software license contracts. Further, DON contracting personnel did not have the necessary training to gain the specialized knowledge to write software license contracts properly. We will provide a copy of the report to the senior official(s) responsible for internal controls in the DON.

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[5] Creation of a virtual (rather than an actual) version of something, such as an operating system or server.

[6] An ELA is a contract document used to purchase software and contains the names and types of software as well as the amount the purchaser is allowed to spend toward the software for a given period of time.

# Finding

## Improvement Needed in the Software Licensing Acquisition Process

In May 2012, the DON made progress toward the mandated use of DON ELAs by issuing a $700 million ELA for Microsoft software. However, the ELA included unacceptable language for embedded third-party software and warranty, which are 2 of the 11 areas of concern with best practices identified in the DoD ESI approved software licensing training. In addition, the 13 DON non-ELA software license contracts, valued at $8.1 million, included unacceptable language for contract clauses in 7 of the 11 areas of concern listed in the software licensing training. Furthermore, 8 of the 13 DON contracting officers accepted EULAs that contained unacceptable language such as inadequate warranty and transfer rights that did not benefit the DoD.

This occurred because the DON had no established requirements for contracting personnel to make a determination on whether to include specific clause language in software license contracts. In addition, 11 of 13 contracting officers did not receive the necessary training to gain the specialized knowledge needed to write software license contracts or review EULAs properly. As a result, the DON increased risk of wasteful spending, disruption to Government operations, and vulnerability to lawsuits, claims, and penalties.

## Microsoft Enterprise Licensing Agreement Awarded to Reduce Costs

DON showed progress in managing software licenses by awarding a Microsoft ELA[7] in May 2012 in accordance with the DON February 2012 memorandum. The ELA allows the DON as well as General Services Administration or other organizations ordering on behalf of DON to place orders for Microsoft software licenses. In addition, according to the memorandum, using the ELA to obtain software will help the DON achieve maximum cost savings. The Microsoft ELA is the only ELA the DON has issued to date. According to DON CIO personnel, they are adapting the use of ELA contracts for all software license procurements, as mandated by the February 2012 memorandum, but Microsoft was implemented first because of its wide use throughout the Navy. A proposed list

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[7] The Microsoft ELA is a blanket purchase agreement between DON and a contractor to purchase Microsoft products.

of 14 additional DON ELA opportunities in the February 2012 memorandum included Cisco, Oracle, Adobe, Symantec, Xerox, and VMware, among others, for future consideration. The memorandum also stated that the DON CIO would post the projected award dates of the potential opportunities to an access-controlled website linked to the CIO website once dates were determined.

According to DON CIO personnel, they have determined projected dates for 11 of the remaining 14 DON ELA opportunities listed in the memorandum and provided a timeline that reflected six opportunities planned for this fiscal year and five in FY 2014. Furthermore, they stated that they will not pursue three of the opportunities because they determined that the opportunities were considered low volume based on initial review.

## Microsoft Enterprise Licensing Agreement Included Unacceptable Language

The ELA for Microsoft software and associated product use rights document (EULA equivalent) included unacceptable language in 2 of 11 areas identified as areas of concern. Specifically, the product use rights document associated with the ELA included unacceptable language in the areas of embedded third-party software and warranty.

The contracting officer that prepared the Microsoft ELA did not consider the risk when he excluded language that would be in the best interest of the DoD in terms of third-party embedded software. Specifically, the Microsoft Federal Product Use Rights document, dated April 2012, attached to the Microsoft ELA stated, with regard to Windows embedded products, "Despite anything to the contrary in the Included Microsoft Software Programs section in the General License Terms, all Windows embedded products are governed by their own license terms." In other words, the DON must not only follow Microsoft's licensing terms but also must follow the licensing terms of the third-party vendors whose products are embedded in Windows.

Although the above statement informed the DON they must follow the licensing terms of third-party vendors, the Products Use Rights did not list the third parties or their licensing terms. The DoD position in the DoD ESI approved software licensing training is that DoD must be aware of the third-party software requirements to weigh the risk to software procurement. The software licensing training also provides examples of desired language for this situation, which would require the publisher of the software

(in this case Microsoft) to ensure they obtained all necessary third-party licenses. In addition, the training suggests language stating that the publisher complies with the third-party licenses and ensures that DoD's use of the product will not be in conflict with the third-party license. In this instance the vendor should have included language that protected the DoD, as intended by the examples provided in the software licensing training. However, according to the contracting officer, the existence of embedded software was not recognized as a risk during negotiations and therefore they did not weigh the risk of third-party embedded software prior to awarding the DON Microsoft ELA.

In addition, the contracting officer accepted warranty disclaimer language in the product use rights document that was not in the best interest of DON in terms of protecting against potential defects in the software. Specifically, the product use rights document included, in addition to the limited warranty, a disclaimer of warranties for merchantability,[8] fitness for a particular purpose, and satisfactory quality. The software licensing training specifically lists disclaimers of these three warranties in an example of unacceptable language when reviewing a disclaimer of warranties clause. However, the Microsoft ELA includes FAR clause 52.212-4, which states that the contractor warrants and implies the items delivered are merchantable and fit for use. Additionally, the general terms and conditions in the contract state that the provisions of FAR 52.212-4 and the ELA take precedence over any terms of the product use rights document. Therefore, the FAR 52.212-4 warranty provisions for merchantability and fitness for a particular purpose would prevail. Neither the provisions of FAR 52.212-4 nor the ELA specifically names satisfactory quality or items such as "accuracy," which is also included in the product use rights disclaimer. The absence of these warranties imposes the risk on the DON that it will have limited recourse if the product fails in these disclaimed areas.

According to the contracting officer, the warranty section of the contract was one of the terms and conditions incorporated from the DoD ESI Microsoft blanket purchase agreement; DON was not able to negotiate terms that differed from this agreement. DON CIO should determine whether it is in the Government's interest to modify the Microsoft enterprise license agreement regarding warranty and embedded third-party software. In addition, the DON CIO should require personnel to include favorable warranty and embedded third-party language when preparing ELAs for the remaining software opportunities on the list, such as Cisco, Oracle, and Adobe, or document how and why they determined and accepted the risk of not including the language.

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[8] To disclaim merchantability means the vendor does not guarantee and will deny any claim for a software product that is not marketable or of commercially acceptable quality.

## Non-Enterprise Licensing Agreement Contracts Did Not Include Best Practice Clauses

The DON could improve the 13 non-ELA contracts reviewed, valued at $8.1 million, by including language provided in the software licensing training. Specifically, the audit team reviewed 13 non-ELA software license contracts[9] issued by 12 different DON contracting offices and determined that none contained all the best practice language to ensure the DON's best interest was protected.

The DON non-ELA software license contracts included unacceptable language for contract clauses in 7 of the 11 areas of concern listed in the software licensing training. For example, of the 13 contracts, none contained acceptable language for warranty, transfer rights, or termination rights. One contract stated that the vendor is to provide a minimum 90-day warranty on all performed work/upgrades. However, the DoD position referenced in the software licensing training recommends a warranty that states

Of the 13 contracts, none contained acceptable language for warranty, transfer rights, or termination rights.

the software shall meet specifications and requirements for 1 year from the first day the product is used. In addition, for transfer rights, the software licensing training refers to the DoD Buyer Checklist, which states the DoD buyer is to add language in the terms and conditions of an order allowing for transfer of licenses within an affiliate of DoD or, at a minimum, within the component (in this instance, DON). However, 12 of the 13 contracts were silent to transfer rights. The one contract that included transfer rights stated that the DON component that received the software recognized that the supplied software was for the sole use of that facility. By both agreeing to terms that restricted sole use to one facility and without any other terms on transfer rights, the contracts did not allow for transfer within DoD or DON as the checklist suggests.

In addition, at least one contract contained unacceptable language in the areas of audit rights, click wrap licenses, order of precedence, and installation restrictions. For example, one contract was silent to both audit rights and click wrap licenses. If a contract were silent on these two areas, we considered it acceptable as long as the EULA was also silent, because this would mean there is also no unacceptable language present. However, the EULA associated with the contract included unacceptable language in both areas. For example, the EULA contained a statement that it is a legal agreement between

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[9] The audit team reviewed two contracts that were prepared by different contracting officers but issued from the same contracting office, to verify a consistent pattern of terms.

an individual or corporation and the vendor; by installing, copying, downloading, or accessing the product, the individual or corporation agrees to the terms of the EULA. This language is labeled as click wrap and considered unacceptable in the DoD ESI approved software licensing training. The complete results of the non-ELA reviews are shown in the table below.

| DON Results of Best Practice Language in 13 Non-ELA Contracts Reviewed | | | |
|---|---|---|---|
| **11 Key Clauses** | **Unacceptable Language*** | **Acceptable Language**** | **Desired Language***** |
| **Warranty** | 13 | 0 | 0 |
| **Transfer Rights** | 13 | 0 | 0 |
| **Third Party Software** | 0 | 13 | 0 |
| **Audit Rights** | 1 | 12 | 0 |
| **Click Wrap Licenses** | 1 | 12 | 0 |
| **Automatic Renewals** | 0 | 13 | 0 |
| **Termination Rights** | 13 | 0 | 0 |
| **Governing Law** | 0 | 12 | 1 |
| **Order of Precedence** | 3 | 10 | 0 |
| **Installation Restrictions** | 1 | 12 | 0 |
| **Virtualization** | 0 | 13 | 0 |

\*    Contract contained undesirable language or was silent (adds risk for certain clauses) on key clauses necessary to meet the intent of the best practices.

\*\*    Contract did not contain the desired language; however, the contract was either silent (acceptable for certain clauses) or contained comparable language, that was deemed acceptable to meet the intent of the best practices training.

\*\*\*    Contract contained desired language from the best practices training

As shown in the table, the majority of the non-ELA contracts contained language we determined was acceptable for 8 of the 11 key areas. However, most of these areas we determined were acceptable because the contract was silent on the area and therefore did not contain unacceptable language. Silence in these areas may help limit possible claims or penalties the DoD could otherwise incur when certain language is found in contracts. However, silence does not help ensure the best interest of the DoD is met as intended by the desired language included in the DoD ESI approved software licensing training. Although we identified issues in the non-ELA contracts, we determined it would not be reasonable or efficient to reopen negotiations for these because of the dollar value of the contracts versus the potential cost to renegotiate. In addition, the DON's movement to ELAs discussed in the Microsoft section should eventually eliminate or minimize the need for these small contracts.

## End User License Agreement Language Did Not Benefit DoD

None of the eight EULAs reviewed contained appropriate language in all the best practice areas. Our review of the EULAs associated with the non-ELA contracts showed that all eight DON contracting officers accepted EULAs that contained unacceptable language that did not benefit the DoD. Specifically, we reviewed EULAs for 8 of the 13 contracts reviewed. For the remaining five contracts:

- one contracting officer stated that the vendor did not provide a EULA or any other Software Agreement with the contract but provided an agreement to the end users with the software;

- one contracting officer stated the contractor provided the end user with terms and conditions after award of the contract but no agreement was received, reviewed, or approved by the contracting office;

- one contracting officer was unsure whether a EULA existed and referred to the original acceptor of the purchase requisition, who stated that he had no written agreements with the vendor; and

- two contracting officers stated that the vendor did not provide a EULA or equivalent document outlining the comprehensive agreement between the Government and publisher or reseller.

Acceptable language for warranty, transfer rights, or termination rights, was not found in any of the eight EULAs reviewed. One EULA, for example, stated that the licensor warrants that the licensed program will conform to the published specifications for

> **Acceptable language for warranty, transfer rights, or termination rights was not found in any of the eight EULAs reviewed.**

180 days from the *date of shipment*. This is far less than the best practice of 1 year from *first use* of the product, as stated in the software licensing training. The remaining EULAs either contained unacceptable language or were silent on these three areas. Because it is in the best interest of DoD to have a warranty on software for at least 1 year, to be able to transfer a license within DoD, and to include proper termination rights, we considered it unacceptable for EULAs to be silent in these areas.

In addition, one contracting officer accepted a EULA that included unacceptable language for audit rights. Specifically, the EULA stated that during business hours, the vendor may inspect the facility and records to verify compliance with the EULA for use of the software
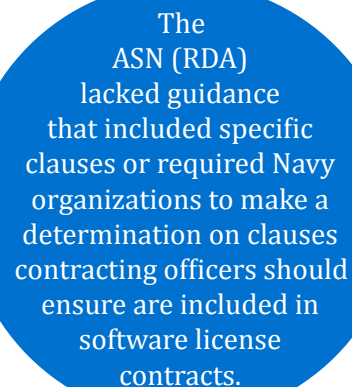
product purchased, throughout the term of service and for 1 year after. If noncompliance was found, the DON organization was required to pay any underpayment amount within 15 days of receipt of a letter. In addition, if underpayment was more than 5 percent of the amount DON should have paid based on the amount of software DON used, the DON organization was required to reimburse the vendor for the amount incurred to conduct their audit. The DoD position in the software training is that the Government should perform self-audits and report the results to the contractor no more than once per year.

All the EULAs reviewed were silent in the areas of third-party software, click wrap licenses, order of precedence, and virtualization. Because the software licensing training provides examples of language contracting officers should recognize and avoid on these topics, we considered the EULAs silence on these topics to be acceptable.

We found only two examples of desired language from the software licensing training in any of the EULAs reviewed. One EULA contained desired language for automatic renewals and another for governing law. For example, one EULA stated "Licensee (DON in this case) shall be notified of renewal options in advance of renewal periods." The inclusion of this statement in the EULA allows the DON to make a determination whether to renew the software product at the end of the contract period, as opposed to automatically renewing.

## Clauses Specific to Software License Acquisitions Were Not Required

The Assistant Secretary of the Navy (Research Development and Acquisitions) (ASN [RDA]) did not develop or issue guidance on whether to include specific clauses in software license contracts; therefore, DON contracts did not include the appropriate best practice language. The Under Secretary of the Navy issued a memorandum tasking the DON to use DoD IT consolidation efforts. In addition, ASN (RDA) and DON CIO issued a memorandum tasking the DON to use DON ELAs to achieve maximum cost savings. However, the ASN (RDA) lacked guidance that included specific clauses or required Navy organizations to make a determination on clauses contracting officers should ensure are included in software license contracts. The DFARS includes subparts that

The ASN (RDA) lacked guidance that included specific clauses or required Navy organizations to make a determination on clauses contracting officers should ensure are included in software license contracts.

address rights regarding computer software, computer software documentation, enterprise software agreements, and acquisition procedures. However, the DFARS subparts prescribe policy and procedures for acquiring commercial software and do not include desired, unacceptable, or recommended language for use in software license contracts. In addition, DFARS Subpart 208.7402 instructs DoD departments and agencies to fulfill requirements for commercial software in accordance with the DoD ESI. The ESI, however, states only that the Software Buyers Checklist is a starting point and does not state that departments and agencies must follow it.
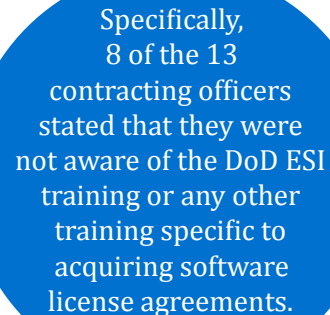
## Contracting Officers Did Not Receive and Were Often Unaware of Specific Training for Writing Software License Contracts

The contracts also did not include the appropriate best practice language because contracting officers did not receive the necessary training to gain the specialized knowledge to write software license contracts properly. Specifically, 11 of the 13 contracting officers stated that they had not received specific training for acquiring software licenses. One contracting officer who had received training stated that he had ESI training a few years ago while working for the Army but had not taken any other specific training for acquiring software licenses. The other contracting officer stated that someone in their office who used ESI extensively provided them with informal training but that she had not taken any other training. The ASN (RDA) should develop a plan of action and milestones in conjunction with the DON CIO, to ensure that contracting officers take software licensing training before issuing any future software license contracts.

Software licensing training that included best practice language was available for contracting officers; however, ASN (RDA) did not require contracting officials to take the training. The Army CHESS website includes briefing slides with the "ABCs of Software." According to CHESS officials, the goal is to provide website videos and tutorials in the future. In addition, CHESS officials stated that DoD ESI is supplementing CHESS by offering a 2-day commercial software training with a chapter on EULAs. However, ASN (RDA) did not require contracting personnel to view the briefings or take the available training. According to DON CIO personnel, they were not in a position to mandate this training to DON contracting personnel, as policies and guidance for the acquisition workforce are under the authority of the Chief Acquisition Officer. However, DON CIO personnel

stated that planning was underway to offer training in FY 2013. During a meeting with ASN (RDA) and DON CIO personnel, they agreed that development of any guidance involving contracting and software related topics is a joint effort between the two offices.

In many cases, DON contracting officers were not aware training was available. Specifically, 8 of the 13 contracting officers stated that they were not aware of the DoD ESI training or any other training specific to acquiring software license agreements. When asked whether they made contracting personnel involved with acquisition of software licenses aware of the available training, DON CIO personnel stated that they mentioned the availability of the ESI training during the DON Information Management/IT conference held in San Diego, California, and Virginia Beach, Virginia, during a "software licensing themed" training session. In addition, they stated that the software licensing training content was provided to each student on CD if they took the Defense Acquisition University Software Acquisition Management 301 class.
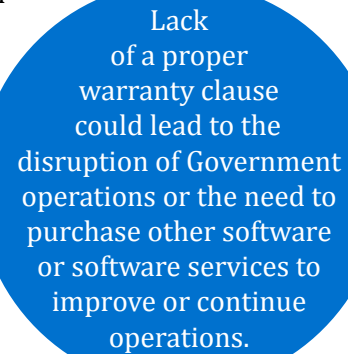
> Specifically, 8 of the 13 contracting officers stated that they were not aware of the DoD ESI training or any other training specific to acquiring software license agreements.

Trainings were in place to address the acquisition of software licenses; however, the trainings were ineffective if contracting officers were not required to take the training or the DON CIO did not make them aware that the training was available. DON contracting officers were made aware of the available trainings only if they attended one of the DON conferences or took the Defense Acquisition University class. The DON CIO's Director of Enterprise Commercial Information Technology Strategy stated that in anticipation of potential recommendations from our report, he authorized the posting of the DoD ESI approved software licensing training to the DoD ESI webpage in March 2013. We verified that "Software Licensing Training: Acquiring Licenses in These Changing Times" was available as of March 2013. The DON CIO should develop and issue a memo identifying the types of training available to contracting officers who prepare software license contracts; this would allow contracting officers to determine the appropriate language needed in the contracts, as well as provide guidance as to acceptable and unacceptable language required in EULAs. Likewise, the ASN(RDA) should require all DON contracting officers who prepare software license contracts and review EULAs, as well as contracting personnel that review software license or software acquisitions contracts prior to issuance, to take specialized training on using appropriate language in software acquisition contracts.

## Increased Risk of Wasteful Spending, Government Disruption, Software Vendor Claims and Other Related Disputes

The DON increases the risk of wasteful spending, disruption to Government operations, and vulnerability to lawsuits, claims, and penalties if it does not include appropriate language in software license contracts that is, geared to protect the best interests of the DON. For example, when a contract includes unacceptable language, such as the contract that contained a 90-day warranty instead of 1 year from the first use of the product, the vendor has no obligation to fix software that malfunctions after 90 days. This lack of a proper warranty clause could lead to the disruption of Government operations or the need to purchase other software or software services to improve or continue operations. In addition to warranties, the inclusion of unacceptable language or silence in areas such as transfer rights, termination rights, and audit rights could result in wasteful spending of funds as well as disruption to Government operations. For example, the contracts that were silent on transfer rights or that allowed transfer only within the program that purchased it, could have unused licenses that could fill the needs of another DON program. However, because the contracts are silent and the EULA does not allow for transfer to other programs, DON could be forced to purchase additional licenses to meet the needs of another program instead of using licenses already owned.

> Lack of a proper warranty clause could lead to the disruption of Government operations or the need to purchase other software or software services to improve or continue operations.

In addition, when a contracting officer accepts audit terms that allow a vendor to inspect a DoD facility and records to verify compliance, they risk exposing DoD information and incurring more costs if DoD must pay for the audit. Further, when vendors are allowed to establish licensing agreements directly with individual end users rather than negotiating an overall software licensing agreement with the contracting officer, the risk increases that software will be misused or improper licensing terms will be accepted. This can result in vendor claims or disputes with DoD in the future.

## Management Comments on the Finding and Our Response

### *Management Comments on Cost-Saving Efficiencies*

The DON CIO submitted general comments, stating that the DON CIO identified Enterprise Software Licensing as a primary DON efficiency target to achieve cost-savings. He stated that through policy and Integrated Product Team actions, the efficiency initiative has realized significant progress contributing over $73 million in current and projected savings using the two Department-wide ELAs awarded to date. He further stated that as DON continues to establish ELAs, they are implementing lessons learned and management best practices including those identified in our recommendations.

### *Our Response*

We commend the DON CIO on the efforts taken to lower prices and increase savings within the DON.

## Recommendations, Management Comments, and Our Responses

### *Recommendation 1*

**We recommend that the Assistant Secretary of the Navy (Research, Development and Acquisition):**

   a. **Require all Navy contracting personnel involved in preparing and issuing software license contracts to take specialized training that ensures software license contracts include only appropriate language that protects the best interest of the Government.**

### *Deputy Assistant Secretary of the Navy for Acquisition and Procurement Comments*

The Executive Director for the Deputy Assistant Secretary of the Navy for Acquisition and Procurement (DASN [AP]) responded for the ASN (RDA) and agreed, stating that the DASN (AP) will issue a memorandum requiring Navy contracting personnel involved in preparing and awarding software license contracts to take specialized training that ensure software license contracts include appropriate language to protect the best interest of the Government. The Executive Director further stated that DASN (AP) would complete the memorandum for issuance within 30 days after DON CIO identifies the available training in accordance with recommendation 2.c.

## Our Response

The Executive Director's comments were responsive, and no additional comments are required.

> **b. Develop a plan of action and milestones in conjunction with the Department of the Navy Chief Information Officer to ensure that contracting officers take software licensing training before issuing any future software license contracts.**

## Deputy Assistant Secretary of the Navy for Acquisition and Procurement Comments

The Executive Director responded for ASN (RDA) and agreed stating that DASN(AP) will coordinate with the DON CIO to develop a plan of action and milestones to ensure that applicable contracting personnel take software licensing training prior to issuing any future software license contracts. The Executive Director stated that DASN(AP) would also complete the plan of actions and milestones within 30 days after DON CIO identifies the dates and types of available training as recommended in recommendation 2.c.

## Our Response

The Executive Director's comments were responsive, and no additional comments are required.

## Recommendation 2

**We recommend that the Department of the Navy Chief Information Officer:**

> **a. Determine whether it is in the Government's interest to modify the Microsoft enterprise license agreement's language regarding warranty and embedded third-party software and take appropriate action.**

## Department of the Navy Chief Information Officer Comments

The Chief Information Officer agreed, stating that the DON CIO, in collaboration with the ASN (RDA), will review the DON Microsoft ELA, which is currently in its second option year of a three-option-year agreement, regarding the warranty and embedded third-party software to assess impact and risk of incorporating this language at this point in the implementation of the current ELA. The Chief Information Officer further explained that in conducting the review, the DON will benchmark its DON Microsoft ELA with other DoD and Federal Agency Microsoft enterprise licenses that are available for review, as

well as with DoD ESI Blanket Purchase Agreements and any related Federal Acquisition Regulation and General Services Administration Schedule 70 provisions. Following the review, the DON will take appropriate action.

## *Our Response*

The Chief Information Officer's comments were responsive, and no additional comments are required.

> **b. Require individuals to include the same or similar language, related to warranty and embedded third-party software, provided in the software license training, when preparing enterprise license agreements for the remaining software opportunities identified in the February 2012 memorandum, "Mandatory Use of Department of the Navy Enterprise Licensing Agreements," or require the individuals to document how and why they determined and accepted the risk of not including the recommended language.**

## *Department of the Navy Chief Information Officer Comments*

The Chief Information Officer agreed stating that through collaboration between ASN-(RDA) and DON CIO, the DON plans to incorporate best practices, terms, and conditions into future DON ELAs and is building and expanding on its commercial software licensing expertise through its multi-organizational and multifunctional DON Enterprise Software Licensing team. The Chief Information Officer further stated that the DON is participating in DoD-level enterprise software license projects through ESI that have a focus on EULAs and commercial software licensing best practices. Finally, he stated that in any DON ELAs they will specifically address warranty and embedded third-party software terms and conditions in documentation that provides rationale if a determination was made not to include the provisions.

## *Our Response*

The Chief Information Officer's comments were responsive, and no additional comments are required.

> **c. Develop and issue a memorandum identifying the types of training— providing knowledge to determine the appropriate language needed in the contracts and acceptable and unacceptable language required in End User License Agreements—available to contracting officers who prepare software license contracts.**

## *Department of the Navy Chief Information Officer Comments*

The Chief Information Officer agreed, stating that the DON CIO, in collaboration with ASN (RDA), will consult with the Defense Acquisition University to explore enhancing software licensing content of appropriate course offerings. The Chief Information Officer further stated that the DON CIO will continue to offer training sessions on topics related to EULAs and make related training content available via the DON CIO and DoD ESI websites. Finally, he stated that the DON will conduct market research on available training on commercial software licensing and communicate availability to ASN (RDA) and apply appropriate methods to achieve the broadcast awareness by DON contracting and IT professionals.

## *Our Response*

The Chief Information Officer's comments were partially responsive. Although the Chief Information Officer plans to collaborate with ASN (RDA) to make efforts toward enhancing training content and will communicate availability of trainings to DON contracting and IT professionals as well as ASN (RDA), he did not include any timelines to achieve this broadcast awareness. Because the timeframe that DASN (AP), under the authority of ASN (RDA), agreed to issue a memorandum requiring Navy contracting personnel involved in preparing and issuing software license contracts to take specialized training in Recommendation 1.a. is based on DON CIO identifying the available trainings, it is critical that the DON CIO sets a reasonable timeline for completing this task. We request that the Chief Information Officer provide additional comments in response to the final report that include a timeline for completing the noted tasks and providing awareness of these opportunities to DON contracting and IT professionals.

# Appendix

## Scope and Methodology

We conducted this performance audit from July 2012 through May 2013 in accordance with generally accepted Government auditing standards. These standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

We conducted this audit to determine if the DON included appropriate clauses in software procurement contracts. We focused our audit on commercial off-the-shelf software contracts issued by the DON in order to review the contract writing practices of DON contracting offices. We selected a nonstatistical sample of Navy contracts active in FY 2012: 1 ELA contract and 13 non-ELA contracts. We received assistance from the Quantitative Methods Division in selecting this nonstatistical sample.

We conducted our review using the most current version of the Army CHESS training, which DoD ESI modified and Army CHESS issued in September 2012 under the name, "Software that Goes Bump in the Night Brief." Based on the DoD ESI and CHESS level of expertise, we considered the best practices listed in the "Software that Goes Bump in the Night Brief" training to be reasonable. We did not perform any tests to determine if the best practices were sufficient to protect the Government's best interest fully when acquiring software licenses.

The "Software that Goes Bump in the Night Brief" training presents the top 11 most occurring areas of concern regarding the acquisition of software licenses. It discusses the suggested DoD ESI's Buyer Checklist requirement for each of the 11 areas and includes examples of acceptable and unacceptable language to look for in contracts and EULAs for each area. For each contract, we reviewed the base contract and the EULA (or equivalent document) provided by the contracting officer, to ensure the contract files included the desirable language and excluded unacceptable language in accordance with each of these 11 areas of concern. Specifically, for all identified language applicable to the 11 areas of concern, the audit team would refer back to the "Software that Goes Bump in the Night Brief" training to verify whether the included language was desirable, acceptable, or unacceptable. When we found a contract that was silent in any of the 11 areas, we would

assess whether it was acceptable or unacceptable for that area to be silent by determining whether it was in the Government's best interest to address the areas in the contract based on the stated best practice for that specific topic. We made the following determinations:

- **Desirable:** Contract documents that included the desirable language per the examples provided in the "Software that Goes Bump in the Night Brief" training for the 11 reviewed areas of concern.

- **Acceptable:** Contract documents that were silent (no language included) to the areas of concern: Third-party software (embedded), audit rights, click wrap license, automatic renewals, governing law, installation restrictions, and virtualization. When a contract did not include unacceptable language for these specific areas of concern, we determined that the Government was not required to perform under those unacceptable terms. Therefore, because the contract documents were completely silent to these specific areas, they were acceptable.

- **Unacceptable:** Contract documents that were silent (no language included) to the areas of concern: Warranty, transfer rights, termination rights, and order of precedence (acceptable for EULA to be silent). Also in this category are the contract documents that included unacceptable language per the examples provided in the "Software that Goes Bump in the Night Brief" training for the 11 reviewed areas of concern.

## Use of Computer-Processed Data

We did not use computer-processed data to perform this audit.

## Use of Technical Assistance

We obtained support from the DoD Office of Inspector General Quantitative Methods Division on sampling methodology. Considering the lack of a Navy Software Licensing Contracts' database, Quantitative Methods Division assisted the audit team in formulating the steps necessary to select a nonstatistical sample for review.

## Prior Coverage

No prior coverage has been conducted on the Navy, including appropriate clauses in software procurement contracts, during the last 5 years.

# Management Comments

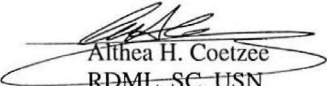## Deputy Assistant Secretary of the Navy for Acquisition and Procurement

**DEPARTMENT OF THE NAVY**
OFFICE OF THE ASSISTANT SECRETARY
RESEARCH, DEVELOPMENT AND ACQUISITION
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

0 8 JUL 2013

MEMORANDUM FOR PROGRAM DIRECTOR, READINESS AND
FIBER OPERATIONS

SUBJECT: The Navy's Management of Software Licenses Needs Improvement (Project
No. D2012-D000LB-0177.000)

The attached document provides our response to Recommendation 1 of the subject
audit report. We do not consider any matters discussed in the report to be exempt from
public release. My point of contact for this action is ████████████. He can be
reached at ████████████████████████.

Althea H. Coetzee
RDML, SC, USN
Executive Director
DASN (AP)

Attachment:
As stated

## Deputy Assistant Secretary of the Navy for Acquisition and Procurement (cont'd)

DEPARTMENT OF DEFENSE INSPECTOR GENERAL REPORT
PROJECT NO. D2012-D000LB-0177.000 DATED 7 JUNE 2013

"THE NAVY'S MANAGEMENT OF SOFTWARE LICENSES
NEEDS IMPROVEMENT"

**RECOMMENDATION 1a. :** The Department of Defense Inspector General (DoDIG) recommended that the Assistant Secretary of the Navy (Research, Development and Acquisition) require all Navy contracting personnel involved in preparing and issuing software license contracts to take specialized training that ensures software license contracts only include appropriate language that protects the best interest of the Government.

**RESPONSE:** Concur. The Deputy Assistant Secretary of the Navy for Acquisition and Procurement (DASN(AP)) will issue a memorandum to Department of the Navy contracting activities requiring all Navy contracting personnel involved in preparing and awarding software license contracts to take specialized training to ensure that software license contracts include appropriate language that protects the best interest of the Government.
Target completion for issuance of the memorandum: Within 30 days after the Department of the Navy Chief Information Officer identifies the training available to contracting personnel who prepare or award software license contracts.

**RECOMMENDATION 1b. :** The DoDIG recommended that the Assistant Secretary of the Navy (Research, Development and Acquisition) develop a plan of action and milestones in conjunction with the Department of the Navy Chief Information Officer to ensure that contracting officers take software licensing training before issuing any future software license contracts.

**RESPONSE:** Concur. DASN(AP) will coordinate with the Department of the Navy Chief Information Officer to develop a plan of action and milestones to ensure that applicable contracting personnel take software licensing training before issuing any future software license contracts.
Target completion for issuance of the plan of action and milestones: Within 30 days after the Department of the Navy Chief Information Officer identifies the dates and types of training available to contracting personnel who prepare or award software license contracts.

# Department of the Navy Chief Information Officer

**DEPARTMENT OF THE NAVY**
CHIEF INFORMATION OFFICER
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

9 July 2013

MEMORANDUM FOR DEPARTMENT OF DEFENSE INSPECTOR GENERAL (DOD IG)

Subj:  RECOMMENDATIONS FOR THE DEPARTMENT OF THE NAVY CHIEF
INFORMATION OFFICE IN THE DEPARTMENT OF DEFENSE INSPECTOR
GENERAL DRAFT REPORT ENTITLED "NAVY SOFTWARE LICENSE
MANAGEMENT NEEDS IMPROVEMENT" (PROJECT NO. D2012-D000LB-
0177.000)

Encl: (1) DON CIO Response to Recommendations Presented in the DoD IG Draft Report:
"Navy Software License Management Needs Improvement" (Project No. D2012-
D000LB-0177.000)

This memorandum forwards the Department of the Navy Chief Information Officer
(DON CIO) response to recommendations 2a, 2b, and 2c, presented in the June 7, 2013
Department of Defense Inspector General (DoD IG) draft report entitled "Navy Software License
Management Needs Improvement" (see enclosure (1)).

The DON CIO point of contact for this audit is ██████████████, who can be reached
at ██████████████████████.

Terry A. Halvorsen
Department of the Navy
Chief Information Officer

Copy to:
ASN (RD&A)
NAVINSGEN

# Department of the Navy Chief Information Officer (cont'd)

**Department of the Navy Chief Information Officer (DON CIO) Response to Recommendations Presented in DoD IG Draft Report, D2012-D000LB-0177.000, Navy Software License Management Needs Improvement**

**General Comment:** As the SECNAV-appointed lead for DON cost-saving Information Technology (IT) efficiencies, the DON CIO identified Enterprise Software Licensing (ESL) as a primary DON efficiency target. Through policy and Integrated Product Team actions, this efficiency initiative has realized significant progress in achieving cost savings and management efficiencies through enterprise licensing. To date, the DON has awarded two Department-wide enterprise license agreements (ELAs) contributing over $73 million in current and projected savings toward the DON savings goal for enterprise software licensing across the FYDP. As the DON continues to establish ELAs, we are refining our demand management processes and implementing lessons learned, which will result in lower prices, increased savings and improved management best practices, including those discussed below.

**Recommendation 2.a.:** Determine whether it is in the Government's interest to modify the Microsoft enterprise license agreement's language regarding warranty and embedded third-party software and take appropriate action.

**Response:** Concur. The DON Microsoft ELA is currently in its second option year of a three option year agreement. The DON CIO, in collaboration with the Assistant Secretary of the Navy (Research, Development and Acquisition) (ASN RDA), will review the DON Microsoft Enterprise License Agreement (ELA) regarding the warranty and embedded third-party software to assess impact and risk of incorporating this language at this point in the implementation of the current ELA. In conducting this review, the DON will benchmark its DON Microsoft ELA with other Department of Defense (DoD) and Federal Agency Microsoft enterprise licenses that are available for review, as well as with DoD Enterprise Software Initiative (ESI) Blanket Purchase Agreements and any related Federal Acquisition Regulation and General Services Administration Schedule 70 provisions. Following this review, the DON will take appropriate action.

**Recommendation 2.b.:** Require individuals to include the same or similar language, related to warranty and embedded third-party software, provided in the software license training, when preparing enterprise license agreements for the remaining software opportunities identified in the February 2012 memorandum, "Mandatory Use of Department of the Navy Enterprise Licensing Agreements," or require the individuals to document how and why they determined and accepted the risk of not including the recommended language.

**Response:** Concur. Through collaboration between ASN RDA and DON CIO, the DON plans to incorporate best practices, terms, and conditions into future DON ELAs. The DON is building and expanding on its commercial software licensing expertise through its multi-organizational and multi-functional DON ESL team. The DON is also participating in DoD level enterprise software licensing projects through the DoD ESI, where End User License Agreements (EULAs) and commercial software licensing best practices are an important focus. For example, the DoD ESI provides sample terms and conditions for use in EULAs and a Software Buyers' Checklist that prompts the buyer to consider specific licensing terms and conditions as part of the buy. The warranty and embedded third-party software terms and conditions will be specifically addressed

Enclosure (1)

# Department of the Navy Chief Information Officer (cont'd)

in documentation with rationale if a determination was made that the provisions will not be included in any DON ELA.

**Recommendation 2.c.:** Develop and issue a memorandum identifying the types of training - providing knowledge to determine the appropriate language needed in the contracts and acceptable and unacceptable language required in End User License Agreements available to contracting officers who prepare software license contracts.

**Response:** Concur. A workforce that is trained and experienced in commercial software licensing is important for effective enterprise license agreements and sustained savings. To this end, the DON CIO, in collaboration with ASN RDA, will consult with the Defense Acquisition University to explore enhancing software licensing content of appropriate course offerings. The DON CIO will continue to offer training sessions on topics related to EULAs and make related training content available via the DON CIO and DoD ESI web sites. Additionally, the DON will conduct market research on available training on commercial software licensing and will communicate availability to ASN RDA for use as needed and will apply appropriate methods to achieve the broadest awareness and participation by DON contracting and IT professionals.

Enclosure (1)

# Acronyms and Abbreviations

| | |
|---|---|
| **ASN (RDA)** | Assistant Secretary of the Navy (Research, Development,  and Acquisition) |
| **CIO** | Chief Information Officer |
| **CHESS** | Computer Hardware Enterprise Software and Solutions |
| **DASN (AP)** | Deputy Assistant Secretary of the Navy (Acquisition and Procurement) |
| **DFARS** | Defense Federal Acquisition Regulation Supplement |
| **DON** | Department of the Navy |
| **ELA** | Enterprise Licensing Agreement |
| **ESI** | Enterprise Software Initiative |
| **EULA** | End User License Agreement |
| **FAR** | Federal Acquisition Regulation |
| **IT** | Information Technology |

## Whistleblower Protection
### U.S. Department of Defense

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